North American Plastics Corporation *and* UNITE! Chicago & Central States Joint Board, Union of Needletrades, Industrial & Textile Employees, AFL–CIO, Petitioner. Case 13–RC–19824

August 27, 1998

ORDER DENYING REVIEW AND APPEAL

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election, and the Regional Director's direction of a mail-ballot election.[1] The request for review is denied as it raises no substantial issues warranting review.

In denying the Employer's request for review of the Regional Director's direction of an election by mail-ballot, we find that the Regional Director did not abuse her discretion. We stress at the outset that this is not the usual or "normal" mail-ballot case; rather, it is a case in which the Employer has interfered with normal (and agreed-on) Board processes, and then comes to us objecting to the resolution reached to the problem it created.

On February 18, 1998,[2] the parties executed a stipulated election agreement providing, inter alia, for a 2-day manual election to be conducted on March 19 and 20 among employees in the agreed-on production and maintenance unit. On March 4, the Petitioner filed an unfair labor practice charge in Case 13–CA–36862, alleging the Employer's layoff of 40 unit employees on February 19 and 20 was violative of Section 8(a)(3) and (1) of the Act. On March 18, the eve of the scheduled election, the Employer notified the Regional Director that the 40 alleged discriminatees would not be permitted on its premises to vote. The Regional Director thereupon withdrew her approval of the stipulated election agreement and issued a notice of hearing.

The hearing was held on March 27. On April 6, the Regional Director issued a Decision and Direction of Election. On April 14, the Regional Director directed that the election be conducted by mail-ballot, and on April 29, set forth her reasons in a letter to the parties. In her Decision and Direction of Election, the Regional Director noted that the Employer conceded that it would not allow the 40 alleged discriminatees to vote on its premises. The Employer suggested a "travelling" election, with a location onsite for the undisputed employees and a nearby off-site location for the 40 alleged discriminatees. Alternatively, the Employer suggested a mixed-manual and mail-ballot election, with mail-ballots for the 40 disputed employees and an onsite manual election for the remaining voters. The Petitioner requested an all-mail-ballot election.

In her April 29 letter, the Regional Director fully explained her reasons for directing a mail-ballot election, including the Employer's continuing refusal to allow the laid off employees to enter its premises to vote. Cf. *Odebrecht Contractors of Florida*, 326 NLRB No. 8 (1998). Now the Employer seeks to appeal the Regional Director's determination to conduct a mail-ballot election, notwithstanding that the Employer created the problem that led to the issue being raised in the first place.

As an initial matter, we agree with the Regional Director's refusal to conduct a manual election on the Employer's premises in light of the Employer's refusal to allow all potentially eligible voters onto its premises to vote. To allow the Employer to insist that the election be conducted on its premises and at the same time dictate which of the eligible voters would be allowed to come onto the premises to vote would be highly prejudicial and would lead to an impression that it is the Employer, not the Board, that controls the mechanics of the election.

Had the Employer not, on the very eve of the election, reneged on its agreement that all eligible voters would vote in a manual election to be conducted on its premises, no inquiry as to alternative voting methods would have been necessary. Having done so, the Employer's protestations that the Regional Director should have selected a *different* alternative procedure are entitled to little, if any, weight. We therefore conclude that the Regional Director did not abuse her discretion by directing a mail-ballot.

Contrary to the dissent, it is clear that the Employer is responsible for the present problems. It is true that the February 19–20 layoff postdated (by a day or two) the parties' February 18 election agreement, and that there is no affirmative proof before us that at the time it executed the election agreement, the Employer knew the layoff would occur. But our dissenting colleagues fail to acknowledge that, or attempt to explain why, the Employer waited a full month, until March 18—the very eve of the scheduled election—to advise the Region that it would not permit the laid-off employees to enter its premises to vote. Our dissenting colleagues' position might have merit had the Employer so notified the Region shortly after the layoff; it clearly is without merit in the circumstances herein.

Even if it had so notified the Region shortly after the layoff, a mail-ballot would not have been an abuse of discretion. Thus, even applying the guidelines set forth in our recent decision in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), we find that the Regional Director

[1] In large part, the Employer's request for review challenges the Regional Director's administrative determination that a mail-ballot election is appropriate. Since that determination was not contained in the Decision and Direction of Election, we have treated those portions of the Employer's request for review as a request for special permission to appeal. Pertinent portions of the Regional Director's Decision and Direction of Election, as well as pertinent portions of the Regional Director's letter setting forth her reasons for directing a mail-ballot election are attached as Appendices A and B.

[2] All dates are in 1998.

acted within her discretion in directing a mail-ballot election. The Employer's refusal to allow the 40 alleged discriminatees to vote on its premises is not unlike a lockout situation, where it is difficult for employees to get to the election site. *San Diego Gas*, supra. Here, it was not only difficult for the 40 potential voters to vote manually at the election site; the Employer made it flatly impossible for them to do so. The Regional Director determined that, given all of the circumstances, a mail-ballot election would provide employees with the best means to decide whether they wished to be represented by the Petitioner, or to remain unrepresented.

Having found that it was unlikely, if not impossible, for the 40 potential voters to vote in a manual election, the Regional Director then properly considered the parties' desires and the efficient use of Board resources. As indicated, the Petitioner sought a mail-ballot election. Although the Employer opposed use of a mail-ballot election for all eligible voters, our decision in *San Diego* requires only that the Regional Director consider the position of the parties, not that there be unanimity for holding a mail-ballot election.

Further, the Regional Director found that a mail-ballot election would conserve scarce agency resources because of the costs associated with the various alternative proposals for a manual or a mixed manual-mail election. In addition, the Regional Director cited the costs associated with the 2-day partial onsite and offsite election proposed by the Employer, including the costs associated with securing an off-site location.[3]

We disagree with the Employer's and the dissent's contention that the Regional Director abused her discretion by rejecting the Employer's proposed alternative of a mixed manual-mail-ballot election. A mixed manual-mail election would result in additional complexity to the election process, and would require substantially more Board resources than either a manual election or a mail-ballot election.

Accordingly, we conclude that the Regional Director acted within the discretion that she has been afforded to determine the method of conducting the election, and we deny review of her determination to hold the election by mail-ballot.

CHAIRMAN GOULD, concurring.

I join my colleagues in denying review of the Regional Director's direction of a mail-ballot election. As I stated in my separate opinion in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), I would find the use of mail-ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve agency resources and/or enfranchise employees. In my view, interference with the Board's processes and other improper conduct can be a factor in a Regional Director's decision to direct a mail-ballot election and therefore I agree with the majority that the Employer cannot object to the resolution reached to the problem it created when it would not allow the 40 alleged discriminatees to vote on its premises. I further agree that, in any event, under guidelines set forth in *San Diego Gas*, a mail-ballot is appropriate in the instant case. Finally, I would also find that the Regional Director's reliance on the conservation of scarce agency resources is a sufficient basis for directing a mail-ballot election. See my separate opinions in *Odebrecht Contractors of Florida*, 326 NLRB No. 8, slip op. at 2 (1998); *Diamond Walnut Growers, Inc.*, 326 NLRB No. 4, slip op. at 3–4 (1998); *San Diego Gas*, supra; *London's Farm Dairy*, 323 NLRB 1057, 1058 at fn. 3 (1997); and *Willamette Industries*, 322 NLRB 856 (1997).

MEMBERS HURTGEN and BRAME, dissenting.

We disagree with the Regional Director's decision to conduct an all-mail-ballot.

The parties stipulated, on February 18, that a manual election would be held on March 19 and 20. On February 19 and 20, the Employer laid off 40 of the 185 unit employees. On March 4, a charge was filed with respect to this layoff.[1] On March 18, the Employer told the Regional Director that the 40 employees would not be permitted to come onto the premises to vote. The Regional Director thereupon ordered a mail-ballot for all employees.

There is no reason whatsoever to have a mail-ballot for the employees who are working at the Employer's facility. Our colleagues say that a mixed election (a manual ballot for working employees and a mail-ballot for the laid off employees) would be more expensive than a mail-ballot for all. Even assuming arguendo that this is so, budgetary reasons cannot justify a mail-ballot. See the dissent in *San Diego Gas*, supra. Our colleagues also note that Petitioner is unwilling to agree to a mixed election. But, surely, a petitioner cannot have a veto power over what is right for this Agency.

The Employer was willing to have a mixed manual-mail-ballot. That would seem feasible and appropriate. With respect to the employees who are still working, there is no showing that a manual ballot would be infeasible. Indeed, the Region was ready to conduct such an election. With respect to the laid-off employees, Manual Section 11336.1 (Mixed Manual-Mail Election) says that mail-ballots can be used for those "who cannot vote in person because of employer action."

Our colleagues also argue that a mixed manual-mail election would result in "additional complexity" to the election process. However, they ignore the fact that the Manual expressly sanctions such mixed elections. In-

[3] Although the Employer offered to pay for the costs associated with acquiring such a site, the Board cannot accept funds from private parties as this would be a prohibited augmentation of our appropriations.

[1] There is no indication that the General Counsel has made any decision with respect to this charge.

deed, such an election would appear to be tailor-made for a situation where, as here, some of the employees can easily vote manually and some cannot.

Our colleagues suggest that the Employer has done something improper in this case. They say that the Employer "interfered with" Board processes and "created" the problems. The argument is untenable. The election agreement did not cover the method of voting for laid-off employees. Indeed, the layoff had not yet occurred, and there is no evidence that the Employer knew, at the time of the election agreement, that there would be a layoff. Further, as noted above, there is no finding that the layoff was unlawful. In addition, there is no allegation that it was unlawful for the Employer to refuse to allow laid-off employees to have access to the plant. Finally, if the Employer has acted unlawfully, the remedy is through an unfair labor practice proceeding. The representation case should focus solely on the best method for carrying out the election.

Finally, our colleagues also say that the Employer should not have waited until March 18 to tell the Regional Office that laid off employees would not be allowed on the property. Assuming arguendo that the Employer's conduct in this regard was improper, the remedy is to file appropriate objections, not to alter the normal election process. The "norm" for employees at work is to have a manual election at work. We would not depart from the norm in order to punish the alleged impropriety.

In sum, there is no basis for an all-mail election, and the Manual provides a reasonable alternative. See the dissent in *San Diego Gas*, supra. See also *Odebrecht Contractors of Florida*, 326 NLRB No. 8, slip op. at 2 (1998) (dissenting opinion).

APPENDIX A

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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[2] The arguments advanced by the parties at the hearing, the Petitioner's oral argument at the close of the hearing, and the Employer's post hearing brief have been carefully considered.

A hearing on the instant petition was ordered after the undersigned canceled a scheduled election and revoked approval of a stipulated election agreement due to an issue raised by the Employer's refusal to allow certain individuals alleged to be "discriminatees" in an unfair labor practice charge onto its premises for the purpose of voting.

At the hearing, the only issue raised by the parties was the manner in which the election should be conducted. The Petitioner took the position that the election should be conducted by mail-ballot, contending that the Employer was refusing to allow a large number of laid-off employees on its premises for the purpose of voting in a Board conducted election. The Employer, conceding that it would not allow former employees and non-employees on its premises to vote in a Board conducted election, took the position that the undersigned Regional Director should order a "traveling" election consisting of a polling place at its facility for employees and a nearby off site polling place for the former employees and non-employees. Alternatively, the Employer took the position that a mixed manual and mail-ballot election be conducted.

In support of their respective positions as to the manner in which the election should be conducted, the parties sought to put evidence into the record. The Petitioner, in an offer of proof, indicated that it would present witnesses who would show that the Employer would not allow "alleged discriminatees" on to its property to vote and would show the extent this would impact the election. The Employer, in an offer of proof, indicated that it would present evidence that a mail-ballot election would be inappropriate due to alleged misconduct of the Petitioner, damage to its property, and illiteracy among the voters. The Hearing Officer rejected the parties offers of proof and refused to allow the parties to present witnesses and evidence going to the manner that the election should be conducted. The Petitioner took a special appeal of the Hearing Officer's ruling, precluding the presentation of evidence to the undersigned, which was denied.

It is my opinion that the time, place, and manner of conducting an election is an administrative matter left to the discretion of the undersigned to determine after having directed an election. "The Board has held that a Regional Director has broad discretion in arranging the details of the election, including, in appropriate instances, determination as to whether to conduct the election in whole or in part by mail-ballot" S*outhwestern Michigan Broadcasting Co.*, 94 NLRB 30, 31 (1951). See also *Halliburton Services*, 265 NLRB 1154 (1982).

Petitioner at the hearing, in support of its position that it is entitled to litigate the manner of conducting an election, cited *Reynolds Wheels International*, 323 NLRB 1062 (1997). However, the undersigned, in denying Petitioner's special appeal, found that case involved different circumstances than found herein and is not controlling herein. In *Reynolds* the Regional Director chose to exercise his/her discretion in determining the manner of conducting the election in the Decision and Direction of Election itself. It is the opinion of the undersigned that a Regional Director's choice of exercising his or her discretion in a Decision and Direction of Election, rather than administratively, does not give rise to a right of the parties to litigate this issue in a pre-election hearing. Moreover, giving the parties a right to litigate issues going to the manner, time, and place of conducting an election unduly expands the potential issues that can be raised at pre-election hearings, which is likely to result in more delays in the processing of petitions and places greater demands on the Board's already scarce resources. Such a result runs counter to the recent efforts of the Board to narrow the scope of litigation in preelection representation hearings, as illustrated by the Board's rules on appropriate units in acute care hospitals.

Accordingly, in the instant case, it is the opinion of the undersigned that the manner of conducting the election is best left to an administrative determination, if an election is directed.

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APPENDIX B

REGIONAL DIRECTOR'S ELECTION ARRANGEMENT LETTER

The petition in this matter was filed on February 3, 1998. A Notice of Hearing issued on February 10, 1998, setting a hearing on February 19, 1998. On February 18, 1998, the day prior

to the scheduled hearing date, the parties entered into a Stipulated Election Agreement. The Agreement provided for a manual election to be conducted on March 18 and 19, 1998. On March 4, 1998, unfair labor practice charges were filed by the Petitioning Union in Case 13–CA–36862 in the Regional Office, alleging the illegal permanent layoff of a number of employees on or about February 19 and 20, 1998. A Request to Proceed was filed by the Union shortly thereafter.

On March 18, 1998, the undersigned was advised that the Employer would not permit approximately 40 employees, whose eligibility to vote in the election was in dispute, on to its premises to vote in the election. Under these circumstances, I withdrew my approval of the Stipulated Election Agreement, by letter dated March 19, 1998, and a Notice of Hearing issued on March 20, 1998. On March 27, 1998, the scheduled hearing was held and on April 6, 1998, I issued a Decision and Direction of Election. On April 14, 1998, Board Agent William M. Belkov notified the parties that the election would be conducted by mail-ballot, with the ballots being mailed to the voters on May 6, 1998. On or about April 21, 1998, the employer filed a "Request for Review of the Regional Director's Decision and Direction of Election and Motion to Stay Election." To the extent that the Employer's request for review constitutes a "special appeal" from my administrative decision to conduct this election by mail ballot, the reasons for my decision are as follows:

The eligibility status of the approximately 40 employees whose employment status is the subject of the charge in Case 13–CA–36862 remains in issue and the Employer has provided no assurance that it will now permit these individuals to enter its premises to vote. Further, while the Employer later offered to pay for an off site polling place reasonably adjacent to its facilities, that offer was rejected because the Petitioner did not agree with the proposal; it wanted a mail-ballot election. Moreover, in view of the Agency's current budgetary situation, expenditure of Agency funds to secure such a site was not deemed prudent. In addition, the Employer and the Union were unable to agree on a plan to permit the employees in issue to vote outside of regular working hours at its premises. As noted, the Petitioner has expressed a preference for a mail-ballot election. In view of the foregoing circumstances, I determined that a mail-ballot election would provide the employees with the best means to decide whether or not they wished to be represented by the Petitioner. This decision not only deals with the issue of potential eligible voters not being allowed on to the employer's premises, it also conserves scarce Agency resources, including the extensive time Board agents would spend on either a regular two day manual election or a two day partial on site, partial off-site election, as proposed by the Employer.

With regard to the issue raised by the Employer as to the literacy of some of its employees, the undersigned is of the view that the issue of an employee's literacy is the same whether the election is conducted manually or by mail.

The Employer also questions the Region's long established practice of posting the election notice in all appropriate languages, with the notice informing employees that the ballot will be in English. This practice has worked well for many years and it has been upheld by the Board and the United States Court of Appeals for the Seventh Circuit; see, *Precise Castings, Inc.,* 294 NLRB 1164 (1989); enfd. 915 F.2d 1160 (7th Cir. 1990).

Accordingly, the arrangements for a mail-ballot election, as set forth in board agent Belkov's letter of April 14, 1998, will continue in full force and effect.